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Supreme Court of the United States

OCTOBER TERM, 1963.

Nos. 1049

[Consolidated Actions]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

OLGA ZDANOK, *et al.*, *Respondents.*

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

FRANK T. ALEXANDER, *et al.*, *Respondents.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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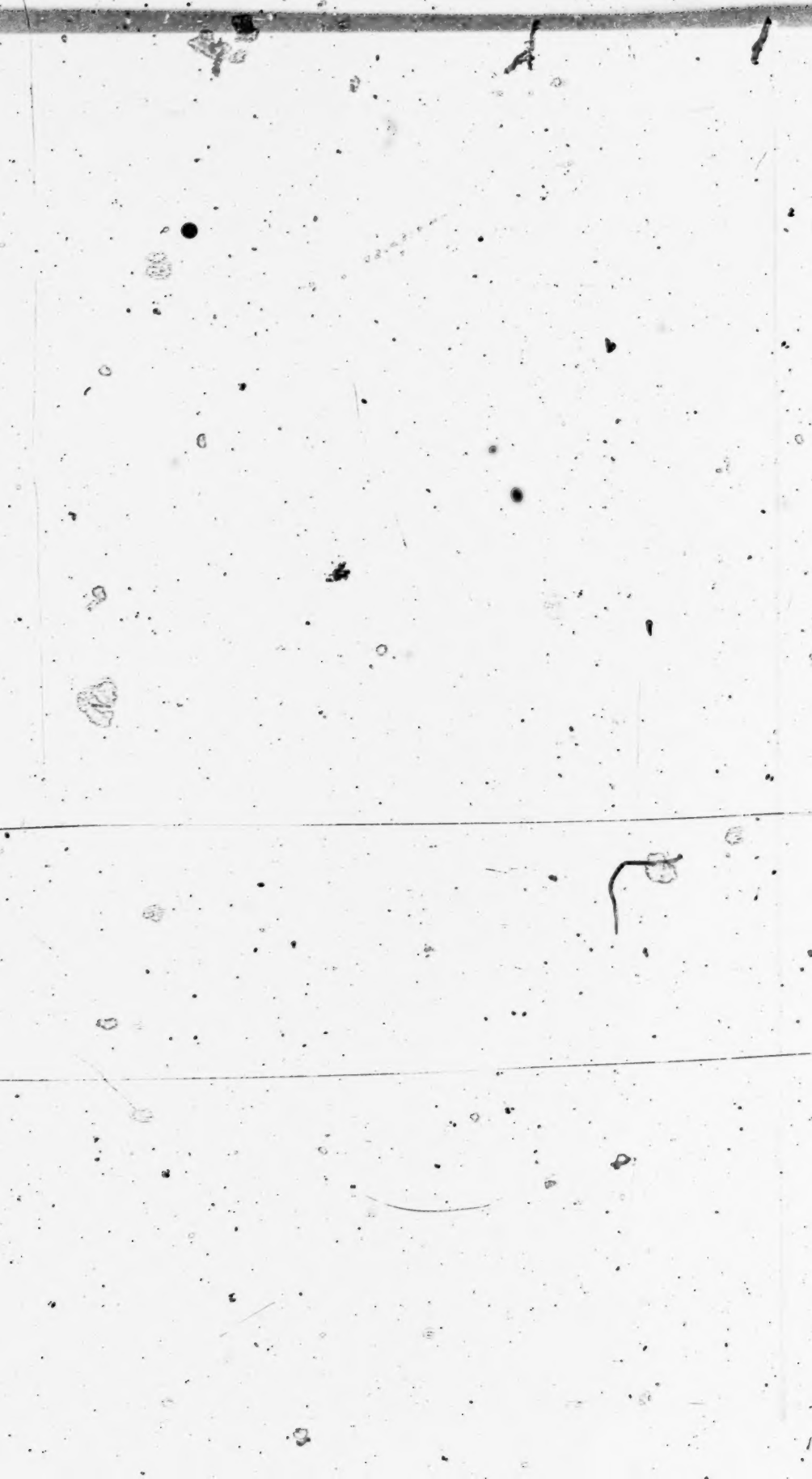

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Supreme Court of the United States

OCTOBER TERM, 1963.

Nos.

[Consolidated Actions]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, *et al.*,

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

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against

FRANK T. ALEXANDER, *et al.*,

Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, The Glidden Company, prays that writs of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgments entered herein on January 29, 1964.

Opinions Below.

The opinion and judgment of the United States District Court, Southern District of New York, in the consolidated cases is reported at 216 F. Supp. 476 and appears at page A-1 of the appendix attached hereto. The opinion of the Court of Appeals is reported at 327 F. 2d 944 and appears at page A-14 of the appendix. The prior opinion of the Court of Appeals in *Zdanok, et al.* v. *The Glidden Co.* is reported at 288 F. 2d 99 and appears at page A-37 of the appendix.

Jurisdiction.

The judgments of the Court of Appeals for the Second Circuit sought to be reviewed in the consolidated cases were entered on January 29, 1964. (See pages A-51, A-52 of the appendix) The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

(1) Whether, as a matter of federal substantive law, the recognition clause of a collective bargaining agreement is merely *descriptio personae*, thereby permitting unlimited extension of the seniority provisions of the agreement to

plants other than that for which the agreement was negotiated.

(2) Whether, as a matter of federal substantive law, the seniority provisions of a collective bargaining agreement confer "vested rights" to employment which survive good-faith termination of the agreement and good-faith closing of the plant for which the agreement was negotiated.

(3) Whether, as a matter of federal substantive law, a judgment in one suit may be asserted as a conclusive determination of an employer's liability under a collective bargaining agreement in successive actions by similarly situated plaintiffs.

(4) Whether this Court's intervening decision in *Smith v. Evening News Ass'n*, 371 U. S. 195 (1962), holding that federal law must be applied in actions by individual employees against employers for breach of collective bargaining agreements, was sufficient to make inapplicable an estoppel by a prior judgment based upon state contract law.[1]

Statutes Involved.

The pertinent provisions of the Labor Management Relations Act, 1947, 29 U. S. C. 141, *et seq.*, appear at page A-52 of the appendix.

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[1] Questions 3 and 4 are presented only in the *Alexander* case. Considered independently, the *Alexander* case does not consider the merits of the Court of Appeals' construction of the collective bargaining agreement. Of course, if the judgment of the Court of Appeals in *Zdanok* is reviewed by this Court (Questions 1 and 2) and found to be erroneous, the *Alexander* judgment, being based upon the conclusive effect of the Court of Appeals' prior *Zdanok* decision, must also fall. At this time, the *Alexander* case presents only the question of whether the Court of Appeals made proper application of the doctrine of collateral estoppel as a matter of federal law.

Statement of the Cases.

These two actions were commenced by respondents, 162 former employees of petitioner, for damages resulting from petitioner's alleged breach of a collective bargaining agreement. Respondents claimed that petitioner breached the seniority provisions of the agreement in failing, upon the termination of production facilities at its plant in Elmhurst, New York, at the expiration of the agreement, to offer respondents employment with seniority at a new plant opened by petitioner at Bethlehem, Pennsylvania.

A. Prior Proceedings.

The first case, *Zdanok, et al.* v. *The Glidden Co.*, involves five plaintiffs and was tried partially before the district court in 1960 on issues of liability. A judgment of that court dismissing respondents' complaint (185 F. Supp. 441), was reversed by the Court of Appeals, Judge Madden holding for a divided court that, under New York contract law, the respondents had acquired "vested rights" in their seniority which survived good-faith termination of the bargaining agreement and extended to the petitioner's new Bethlehem plant (288 F. 2d 99).

This Court thereafter granted certiorari on the limited question of whether participation of a judge of the Court of Claims vitiated the judgment of the Court of Appeals (368 U. S. 814). This Court, noting that the Court of Appeals had determined "a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants," affirmed the Court of Appeals' decision on the limited jurisdictional issue presented (370 U. S. 530, 537, *reh. denied*, 371 U. S. 854 (1962)).

The second action, *Alexander, et al.* v. *The Glidden Co.* involves 157 plaintiffs and was filed in the District Court on

June 26, 1962, just one day after this Court affirmed the judgment of the Second Circuit in *Zdanok*.[2] The *Alexander* case was consolidated with *Zdanok* upon remand of that case to the district court "because of convenience and the existence of common questions of law and fact" (R. 85).

On January 28, 1963, the consolidated cases came on for trial in the district court and evidence was presented concerning matters bearing on interpretation of the collective bargaining agreement. This represented the first evidence offered in these cases concerning the interpretation of the agreement by the contracting parties.[3]

At the close of respondents' evidence, petitioner moved to dismiss the complaints in each action on the ground that this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962) required application of federal substantive law in these actions and that the issue of its liability was no longer controlled by the Second Circuit's prior *Zdanok* decision inasmuch as that court had erro-

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[2] The *Alexander* case was originally filed in the New York Supreme Court, New York County, in 1958. Additional parties plaintiff were added by counsel for respondents right up to and after the time of the trial of the consolidated actions in the district court in 1963 (pages 776, 1014, 1150 of record from United States District Court Southern District).

[3] This evidence, admitted without objection and after respondents themselves had presented evidence in both cases, showed that respondents' bargaining representative, Local 852, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, claimed only the right *to negotiate* with defendant on severance pay and the transfer of willing employees to Bethlehem. The union did not claim any right on behalf of the employees to transfer to the new plant and, in fact, *acknowledged that the plaintiffs had no such right under the bargaining agreement* (R. 107-108, 136-138). This and other evidence led the district court to conclude that "the parties entertained no expectations that the employees' rights would survive removal of the Elmhurst plant" (page A-8 of appendix), and Chief Judge Lumbard to agree on appeal that it was "clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement" (page A-36 of appendix).

neously applied New York contract law in resolution of the issues in that case (pages 832 to 845, of Record from United States District Court, Southern District). This motion was renewed at the close of petitioner's evidence, at which point petitioner maintained that under applicable federal law and the evidence presented concerning interpretation of the bargaining agreement, petitioner was entitled to judgment in both cases (pages 988 to 1004 of Record from United States District Court, Southern District).

B. Decision Of The District Court.

Although the district court specifically found that the contracting parties "entertained no expectation" that respondents' seniority would survive termination of the agreement, the court considered itself bound by the Court of Appeals interpretation of the bargaining agreement on the prior appeal of the *Zdanok* case and entered judgment for plaintiffs on all issues of liability in each case (pages A-8, A-13 of appendix). The district court was of the opinion that the orders and judgments involved controlling questions of law as to which there was substantial ground for difference of opinion and promptly certified the consolidated cases for an interlocutory appeal pursuant to 28 U. S. C. §1292(b) to the Court of Appeals (pages A-10, A-11 of appendix).

C. Decision Of The Court of Appeals.

(1) The *Zdanok* Case.

In *Zdanok*, the Court of Appeals, recognizing that the contract must be construed according to federal law under this Court's intervening *Smith* decision, adopted as federal law on this appeal its prior decision in the *Zdanok* case. Conceding that its earlier decision, when adopted as federal law, was in direct conflict with a recent decision of the Sixth Circuit, the Court of Appeals nevertheless declined to change its prior decision under the "law of the case"

doctrine since the conflict did not mean "that the construction previously given by the majority in this Court was wrong" (pages A-24, A-25, A-26 of appendix).

(2) The *Alexander* Case.

The Court of Appeals gave separate attention to *Alexander* but held that petitioner should have been precluded by the District Court under the doctrine of collateral estoppel from contesting liability in this case in 1963. Excluding from consideration all evidence offered by petitioner in *Alexander* upon trial of that action in the District Court, the Court of Appeals concluded that the cases were the same, and that the "law of the case" established on the prior appeal of *Zdanok* could be extended to cover the *Alexander* action also. The Court of Appeals therefore affirmed the judgment of the District Court notwithstanding the change in controlling law announced by this Court's intervening *Smith* decision and despite the fact that none of the *Alexander* plaintiffs were parties to the earlier *Zdanok* case, several plaintiffs being added right up to and after the time of trial in 1963 (pages 776, 1014, 1150 of Record from the United States District Court, Southern District).[4]

Reasons for Granting the Writ in the *Zdanok* Case.

The original *Zdanok decision* (pages A-37 to A-48 of appendix) rested on two basic propositions; namely, (a) that description of the bargaining unit in terms of geographical location in this agreement was *descriptio per-*

[4] Chief Judge Lumbard, noting that it was "clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement," reluctantly concurred in the "law of the case" and collateral estoppel affirmance of the district court judgments, even though the result reached was "completely at variance with the intention of the parties" (page A-36 of appendix).

sonae, thereby permitting respondents' seniority to extend to another location, and (b) that the seniority provisions of the agreement conferred "vested rights" on these respondents which survived termination of the agreement. These propositions, now adopted by the court below as federal substantive law, run contrary to numerous decisions of other federal courts and of the NLRB involving the administration and enforcement of collective bargaining agreements.

A. As A Matter Of Federal Substantive Law Description Of A Bargaining Unit In Terms of Geographical Location In A Collective Bargaining Agreement is Not Merely *"Descriptio Personae"* But Defines And Limits The Operative Geographical Scope Of The Agreement.

1. The Holding of the Court of Appeals to the Contrary is in Direct Conflict with a Recent Decision of the United States Court of Appeals for the Sixth Circuit.

The decision of the Court of Appeals in the *Zdanok* case is directly in conflict with the decision of the Sixth Circuit Court of Appeals in *Oddie* v. *Ross Gear & Tool Co., Inc.*, 305 F. 2d 143 (1962), *cert. denied*, 371 U. S. 941 (1962).

The Court of Appeals, while recognizing, as urged by petitioner, that the construction of the contract in question must be determined by federal law, adopted as federal law, that court's prior decision in *Zdanok, et al.* v. *The Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *aff'd on limited grounds*, 370 U. S. 530, *reh. denied*, 371 U. S. 854 (1952). That prior decision, as stated by Mr. Justice Harlan of this Court, was based upon New York contract law and not federal substantive law (370 U. S. at 537). Consequently, the conflict did not arise until that prior holding was adopted by the court below in the instant cases as federal substantive law.

The conflict was conceded in the opinion by Judge Friendly in the Court of Appeals when he stated that *Oddie v. Ross Gear & Tool Co., Inc., supra,* was "not fairly" distinguishable from the instant cases "despite the Sixth Circuit's politeness in calling the Glidden agreement 'materially different'" (page A-25 of appendix). Later in the opinion, Judge Friendly, in comparing the *Oddie* decision with the prior *Zdanok* decision, describes the *Oddie* decision as the "contrary one of the Sixth Circuit"[5] (page A-26 of appendix).

The Court of Appeals in the first *Zdanok* decision, now adopted as federal substantive law, expressly held that the recognition clause of the agreement was "*descriptio personae*" and therefore did not define or restrict the geographical scope of the agreement or limit the seniority provisions thereof to the plant for which the agreement was negotiated. In *Oddie,* however, the Sixth Circuit expressly held as a matter of federal substantive law that the recognition clause of a collective bargaining agreement is not merely *desriptio personae,* but serves to define the geographical scope of the agreement and to limit the seniority provisions to the plant for which the agreement is negotiated.

The conflict cannot be avoided by any comparison of the recognition clauses in the two contracts construed by these courts. Despite the "politeness" of the Sixth Circuit, the recognition clause in the Glidden contract is fully as

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[5] Since the Court of Appeals' prior *Zdanok* decision was based upon New York contract law, there was no conflict between the circuits as of the time the *Oddie* plaintiffs petitioned this Court for a writ of certiorari during the 1962 Term. As Judge Friendly recognized in his opinion in the instant cases, "The Supreme Court's expressed belief that our ruling rested on state law deprives the denial of certiorari in *Oddie* of whatever small significance it might otherwise have had. Supreme Court Rule 19(b)" (footnote on page A-25 of appendix).

descriptive as the recognition clause in the Ross Gear & Tool contract construed by the Sixth Circuit.[6] Both courts approached interpretation of the recognition clauses of these agreements as questions of law presented by clear and unambiguous contract terms.

Application by the Court of Appeals of the so-called "law of the case" doctrine to uphold its prior decision does not affect the conflict. The Court of Appeals recognized that it was required, in view of this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), to reconsider its prior judgment and, in so doing, expressly adopted the prior decision as federal substantive law. Law of the case was applied only because the Court of Appeals did not believe the conflict to show "that the construction previously given by the majority in this Court was wrong" as a matter of federal law (page A-24 of appendix).

The *Zdanok* case was before the Court of Appeals a second time and, as Judge Friendly pointed out, the court's second decision came down "to a calculus of the relative unseemliness of a court's altering a legal ruling as to the same litigants, with the danger that this may reflect only a change in the membership of the tribunal * * *" (page

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[6] The *Oddie* recognition clause provided: "The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the Greater Detroit Area which is located within the city limits * * *" (305 F. 2d at 147).

The Glidden contract, which recited in the preamble that the agreement was made by Glidden "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York," provided in the recognition clause: "The Company recognizes the Union as the exclusive representative of all hourly paid production, maintenance and service employees of the Company at the plant facilities named above * * *" (R. 22). Although identical in legal effect, the Glidden clause is in geographic terms more restrictive than that considered by the Sixth Circuit in *Oddie*.

A-27 of appendix). The reason the Court of Appeals failed to correct its earlier decision is thus peculiar to that court and has no effect on the posture of these cases before this Court. This was recognized by Judge Friendly himself in emphasizing that the Court of Appeals' application of law of the case does not give the decision any special standing before this Court. Here Judge Friendly relied on *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940), where Judge Magruder remarked at page 317:

> "After we affirm a judgment on the ground that our decision on an earlier appeal has become the law of the case, the Supreme Court is nevertheless free to take the case on certiorari and reverse our judgment. * * * The Supreme Court frequently does so. * * * Sometimes it does so even when application for certiorari to review our earlier judgment had been applied for and denied. * * * Our law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case."

Finally, the conflict created is not in any sense diminished by the statement in Judge Friendly's opinion that the only effect of the Sixth Circuit's *Oddie* ruling was to create some doubt as to whether *Zdanok* or *Oddie* would be followed in future cases. This statement only demonstrates what is the inevitable consequence of any conflict among the circuits on an important question of federal law and is the most compelling reason for consideration of these cases by this Court. Moreover, the doubt has been effectively resolved in the Second Circuit against employers in petitioner's position, since the Court of Appeals remains unconvinced that its prior decision was wrong as

a matter of federal law. Hence, the conflict will persist unless and until it is resolved by this Court.

2. The Decision of the Court of Appeals is also in Conflict With Several Decisions of the NLRB Involving the Administration and Enforcement of Collective Bargaining Agreements.

Although holding that description of the bargaining unit in this agreement was merely *descriptio personae* and, accordingly, did not restrict the operative geographical scope of the agreement, Judge Madden recognized in the prior *Zdanok* decision that few of petitioner's employees would have made the move to Bethlehem when the Elmhurst plant was closed (288 F. 2d at 104). This being the case, there is no basis as a matter of federal law for extending by implication any of the respondents' rights under this agreement to Bethlehem, since the NLRB has repeatedly ruled that an employer cannot even expressly contract for the extension of an agreement to a new facility when a majority of the employees fail to follow the work to the new location.[7] *Roover-Lotsch Corp.*, 1960 C. C. H. N. L. R. B. para. 9006; *Edward Aaron Corp.*, 125 N. L. R. B. 840 (1959); *Sinclair Refining Co.*, 92 N. L. R. B. 643 (1950); *St. Regis Paper Co.*, 84 N. L. R. B., 454 (1949). In adopting its prior *Zdanok* decision as federal law, the Second Circuit has given a scope and effect to this agreement by implica-

[7] If, as the Court of Appeals in its earlier decision of 1961 in *Zdanok* said (page A-46 of appendix), referring to the time of the closing of the Elmhurst plant in 1957, "many would not have made the move" to Bethlehem, it certainly cannot be assumed that at the time the agreement was negotiated, the parties contemplated that a majority of the Elmhurst employees would move to a plant in another state should the Elmhurst plant close. See, *e.g.*, *Brown Truck & Trailer Mfg. Co., Inc.*, 106 N. L. R. B. 999, 1002 (1953).

tion which the NLRB has ruled cannot be done by specific provision in the agreement.[8]

An agreement providing for extension to a new facility contemplated by the employer is not only ineffective at the new location, but may also involve the employer in an unfair labor practice in that it deprives employees of a free choice in the selection of their bargaining representative. For example, in *Chicago Freight Car & Parts Co.*, 83 N. L. R. B. 1163 (1949), the Board held that mere execution of an agreement between an employer and the union representing its employees at one location violated §8(a)(1) and (3) of the Act because the agreement purported to include within its geographical scope prospective employees at a facility contemplated by the employer at another location. See also, *NLRB* v. *Masters-Lake Success, Inc.*, 287 F. 2d 35 (2d Cir. 1961), *enforcing*, 124 N. L. R. B. 580 (1959), where the Court of Appeals itself recognized and enforced such an order.

The Court of Appeals' adoption of its prior *Zdanok* decision as one "compatible with the purpose" of §301 of the LMRA is clearly undermined by these decisions of the NLRB. Employers in the Second Circuit are now given the Hobson's choice of either extending contractual obligations beyond their negotiated scope in violation of the LMRA, or complying with the Act and thereby subjecting themselves to damage suits by dissatisfied employees. Any

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[8] Other courts have refused to make such a paradox of the national labor policy. *Oddie* v. *Ross Gear & Tool Co., Inc., supra; Bradley* v. *Sangamo Elec. Co.*, 46 C. C. H. Lab. Cas. para. 17,843 (Ill. Cir. 1962), and the overwhelming weight of arbitration authority is that "the description of the bargaining unit in terms of geographical location is not merely *descriptio personae*," but defines and limits the operative geographical scope of the agreement. *United Packers, Inc.*, 38 L. A. 619, 620 (1962); *Sivyer Steel Castings Co.*, 39 L. A. 449 (1962).

decision imposing such a dilemna on well-meaning employers can hardly be what this Court called for in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957), where it directed the lower federal courts "to find the rule that will best effectuate the federal policy."[9]

B. As a Matter of Federal Substantive Law, the Seniority Provisions of a Collective Bargaining Agreement do not Survive Good-Faith Termination of the Agreement in Accordance with its Terms.

1. The Holding of the Court of Appeals to the Contrary is in Conflict With Decisions of this Court and Decisions of the Courts of Appeals for the Fifth, Sixth, Seventh and Ninth Circuits.

It is well established as a matter of federal substantive law that an employee can acquire no "inherent right to seniority in service." *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 53 (1947); *NLRB* v. *Wheland Co.*, 271 F. 2d 122, 124 (6th Cir. 1959). Federal courts have consistently held that seniority rights do not extend beyond good-faith termination of the agreement under which they were acquired since, under federal law, they are dependent upon the existence of such an agreement and an employer-employee relationship. *System Federation No. 59 of Ry. Employees* v. *La. &*

[9] The Court of Appeals abruptly dismissed the foregoing cases, saying that these cases "do not say that a contract whereby an employer undertook to recognize existing seniority in hiring at a new plant would constitute an unfair labor practice, or that an employer who had so contracted would commit an infraction by refusing to violate his commitment in a bargain with the duly chosen representative at the new location." (page A-25 of appendix). This comment is in direct conflict with the holdings in these cases and ignores the fact that the unfair labor practice consists in the execution, as well as performance, of such an agreement. *Chicago Freight Car & Parts Co., supra* at 1165.

A. Ry. Co., 119 F. 2d 509 (5th Cir. 1941); *Colbert* v. *Brotherhood of R. R. Trainmen*, 206 F. 2d 9 (9th Cir. 1953), *cert. denied*, 346 U. S. 931 (1954); *Shiels* v. *Baltimore & O. R. R.*, 154 F. Supp. 917 (S. D. Ind. 1957); *aff'd*, 254 F. 2d 863 (7th Cir. 1958), *cert. denied*, 356 U. S. 846 (1958); *Local Lodge 2040, Int'l Ass'n of Machinists* v. *Servel*, 268 F. 2d 692, 698 (7th Cir. 1959), *cert. denied*, 361 U. S. 884, (1959); *NLRB* v. *Int'l Ass'n of Machinists*, 279 F. 2d 761 (9th Cir. 1960), *cert. denied*, 364 U. S. 890 (1960).

While the fact patterns in each of the foregoing cases vary from case to case, each case was decided on the theory that seniority rights are creatures of agreement and do not survive either termination of the agreement under which they are acquired or termination of the employer-employee relationship. This principle, which is well established as a matter of federal law, does not vary from case to case and stands in direct opposition to the decision of the Court of Appeals that respondents acquired "vested rights" in their seniority which survived good-faith termination of this agreement.

This aspect of the decision of the Court of Appeals cannot be dismissed as a factual matter based solely on the particular terms of the agreement under consideration. Contracts providing for retention of seniority rights by laid-off employees for periods ranging from one to three years are the rule, not the exception, in unionized industries. Harbison, *Seniority Policies and Procedures as Developed Through Collective Bargaining* 57 (1941); see also, *Analysis of Layoff, Recall and Work Sharing Procedures in Union Contracts*, U. S. Dept. of Labor Bull. No. 1209 (1957); *Seniority Provisions in Union Agreements*, U. S. Dept. of Labor Bull. R. 1308 (1941). In fact, such a provision is not necessary to retention of seniority during layoff so long as the contract remains in effect. *A. D. Julliard &*

Co., 15 L. A. 934 (1951). Provisions of this nature are designed to limit rather than extend the recall period.

Here, as in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 333 (1953), this Court should grant certiorari "because of the wide-spread use of contractual provisions comparable to those before us and because of the general importance of the issue in relation to collective bargaining." Problems arising from retention of seniority in plant relocations present recurring problems in every segment of industry in the United States and most certainly warrant the attention of this Court.

Reasons for Granting the Writ in the *Alexander* Case.

A. The Doctrine of Collateral Estoppel Does Not, as a Matter of Federal Law, Prevent a Common Defendant from Relitigating Issues, Adversely Determined in a Prior Action, Against Strangers to that Judgment in Subsequent Proceedings.

1. The Court of Appeals' Ruling to the Contrary Involves an Important and Recurring Question of Federal Substantive Law Which Conflicts With Decisions of this Court and of the Courts of Appeals for the First, Third, Sixth, Ninth and Tenth Circuits.

After adopting its prior *Zdanok* decision as federal law in that case, the Court of Appeals moved to the companion case of *Alexander*, saying that "since both the *Zdanok* and *Alexander* actions present questions of federal law, we are free to follow our own conceptions as to the effect of the judgment in the former on the latter" (page A-34 of appendix). The co[illegible] then held that petitioner was col-

laterally estopped from contesting liability in *Alexander* by virtue of the first *Zdanok* decision, although none of the *Alexander* plaintiffs were parties to that action, additional plaintiffs being added right up until the time of trial in 1963.

This Court has long recognized that "the operation of an estoppel must be mutual," *Keokuk & Western Ry. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894), and that persons who would not have been affected by an adverse decree in a prior suit cannot take advantage of the same by way of estoppel.[10] *United States* v. *Pink*, 315 U. S. 203 (1942); *Triplett* v. *Lowell*, 297 U. S. 638 (1936). By holding that petitioner was precluded by virtue of the *Zdanok* decision from contesting liability in *Alexander*, the Court of Appeals made a drastic and unprecedented departure from a rule vital to the proper administration of justice in the federal courts and uniformly applied by this Court and every Court of Appeals which has had occasion to consider the issue as a matter of federal law.

The Court of Appeals' *Alexander* decision stands in direct conflict with that of the First Circuit in *Bird* v. *United States*, 241 F. 2d 516 (1st Cir. 1957), where Judge Magruder held that a shareholder of a Massachusetts corporation could not estop the Government from contesting whether a distribution of preferred stock was taxable as income on the basis of an adverse judgment in a case involving the same distribution to other shareholders of the same corporation.

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[10] The leading case in this area is *Keokuk & Western Ry. Co.* v. *Missouri*, *supra*, where this Court denied a corporation the right to use a judgment obtained in a prior suit by shareholders of the corporation in an identical action against the same defendants. Exceptions to this rule were noted by Circuit Judge A. N. Hand in *Adriaanse* v. *United States*, 184 F. 2d 968 (1950), *cert. denied*, 340 U. S. 932 (1951), relied on by the Court of Appeals in support of its estoppel ruling. *Alexander* does not fall within these recognized exceptions to the rule but represents a new and ill-considered exception which completely engulfs the general rule.

The decision of the Court of Appeals in *Alexander* provides a perfect parallel with those facts held insufficient for application of estoppel by judgment in *Bird*. The First Circuit denied the plaintiff in *Bird* the right to hold the Government to an issue determined in a prior suit involving the same distribution to other shareholders of the same corporation. The court below, however, permitted respondents in *Alexander* to hold petitioner to an interpretation of the bargaining agreement reached in a prior suit involving other employees of the same company. The cases differ only in result and create a conflict which can be resolved only by this Court.

The unprecedented decision of the Court of Appeals in *Alexander* also runs contrary to decisions of the Tenth Circuit, *Crawford Production Co.* v. *Bearden*, 272 F. 2d 100 (10th Cir. 1959); the Ninth Circuit, *Moore* v. *United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U. S. 827 (1947); the Sixth Circuit, *Madden* v. *Mack Sim Bar Paper Co.*, 103 F. 2d 974 (6th Cir. 1939), *cert. denied*, 308 U. S. 556 (1939); and the Third Circuit, *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (3d Cir. 1917), *appeal dismissed*, 248 U. S. 595 (1919), where the mutuality rule was applied and strangers to prior proceedings were denied the right to use prior judgments offensively in subsequent actions involving other parties common to the earlier suits.

The decision of the court below in *Alexander* thus stands alone as a matter of federal law and in direct conflict with decisions of this Court and several Courts of Appeals. Needless to say, any deviation from rules of law uniformly applied by the federal courts for some 70 years is a matter which requires exercise of the supervisory jurisdiction of this Court. The fact that this was done by the Court of Appeals to exclude evidence which, by the court's own admission, might have been "decisive" (page

A-29 of appendix) commends this case to this Court as a matter of equity as well as necessity.[11]

In its determination to avoid the merits in *Alexander*, the Court of Appeals created what some commentators have critically referred to as the "multiple claimant anomaly." See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 Tul. L. Rev. 301 (1961). Thus, under the rule fashioned by the Court of Appeals, a party against whom 50 successive actions are filed could not assert the conclusive effect of favorable judgments obtained in the first 25 actions tried in any subsequent actions. However, if the plaintiff should prevail in the 26th case tried, the defendant may be estopped from contesting liability in every subsequent action.

Judge Friendly found "understandable" the "belief that something was wrong in that picture" and sought to avoid the problem by limiting the *Alexander* rule to cases in which the party against whom the plea of estoppel is asserted has had "a full and fair opportunity to litigate the issue effectively" (page A-33 of appendix). This standard only begs the question posed by the anomaly and

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[11] The case considered by the Court of Appeals to provide the most support for its estoppel ruling was the California Supreme Court's decision in *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942). But *Bernhard*, a case decided under California law, was a case in which a stranger to the prior suit was permitted to assert *as a defense* the conclusive effect of the prior judgment against a party to that action. Even in California, where Judge Friendly says "the widest breach in the citadel of mutuality" occurred (page A-30 of appendix), the mutuality requirement persists where an adverse judgment is sought to be asserted against a common defendant in successive actions brought by similarly situated plaintiffs. *Navarov* v. *Caldwell*, 161 Cal. App. 2d 762, 327 P. 2d 111 (1958), *hearing denied*, 327 P. 2d 122 (1958).

Judge Friendly (footnote 15 on page A-30 of appendix) stated "On its facts the *Bernhard* case would seem to have come within a long recognized exception to the requirement of privity—namely, that a judgment in favor of an indemnitor precludes a later action against an indemnitee".

offers little justification for the staggering disadvantage imposed by the court below on common defendants to successive actions brought by similarly situated plaintiffs.[12]

The tremendous impact the decision below will have on the administration of justice in the federal courts is nowhere more apparent than in the area of law forming the context of this very case. In *Smith* v. *Evening News Ass'n, supra*, this Court established rights of action under collective bargaining agreements for individual employees as a matter of federal law. In *Alexander*, however, the court below established by means of an unprecedented application of the doctrine of collateral estoppel that employers may defend once and only once any action of this nature. The court below has thus converted the individual claims authorized by this Court's *Smith* decision into class actions which now can determine liability of an employer to literally thousands of employees.[13] Any decision which disrupts such established rules of judicial administration and so impedes implementation of the national labor policy is a matter which demands consideration and decision by this Court.

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[12] The anomaly is in no way changed by the fact that the defendant may have had "a full and fair opportunity" to defend one case. The suggested test has even less merit in cases where, as here, the issue on the merits is admitted by the court to be "such a close one" (page A-29 of appendix). Those waiting in the wings for the right result naturally will resist consolidation.

[13] The bandwagon psychology such a decision creates is also apparent upon examination of the case under consideration where several plaintiffs were added right up to and after the time of trial in 1963 (pages 776, 1014, 1150 of Record from the United States District Court, Southern District). Moreover, one of the respondents in *Alexander* testified upon trial of this action in the District Court that he had never made any claim of his own against petitioner, and that it was only after receiving letters from counsel for respondents that he decided to become a plaintiff in the *Alexander* action and make a claim against petitioner for loss of seniority. (R. 97.) Far from promoting repose and judicial economy, the decision of the court below can only encourage frivolous claims in the hope that one will succeed and thereby establish liability for any number of similar claims.

B. A Decision of this Court Changing Controlling Principles of Law and Intervening Between two Proceedings Involving a Common Defendant Renders the Doctrine of Collateral Estoppel Inapplicable to the Second Proceeding.

1. In Applying Collateral Estoppel to the *Alexander* Case Despite the Intervening Decision of this Court in *Smith* v. *Evening News Association*, 371 U. S. 195 (1962), the Court of Appeals Decided a Recurring Question of Federal Law in Conflict With Decisions of this Court and the Courts of Appeals for the Third and Ninth Circuits.

The court below held petitioner estopped from contesting liability in the *Alexander* case on the basis of its prior *Zdanok* decision, a case recognized by this Court (370 U. S. at 530) and the Court of Appeals as one decided under New York contract law (page A-23 of appendix). This was done by the Court of Appeals despite this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), which determined for the first time that actions brought by individual employees against their employers under collective bargaining agreements should be controlled, as a substantive matter, by federal law.

It is not entirely clear what consideration the Court of Appeals gave to this Court's *Smith* decision by way of its effect on the applicability of collateral estoppel to the *Alexander* case since the estoppel issue was never raised, briefed or argued in the courts below. The *Smith* case is discussed by the Court of Appeals in that portion of the opinion relating to *Zdanok* (page A-22 of appendix). There Judge Friendly refused to alter the prior *Zdanok* decision because the intervening change of law did not create "a clear conviction of error" with respect to the prior decision

(page A-27 of appendix). It can only be concluded that since *Smith* failed to demonstrate clear error with respect to the first *Zdanok* decision and, accordingly, provided no basis for deviation from the "law of the case" in *Zdanok*, the Court of Appeals considered it equally ineffective as a means of rendering the estoppel doctrine inapplicable to *Alexander*.

While the Court of Appeals may have required "clear conviction of error" before deviating from the limited law of the case in *Zdanok* upon the second appeal of that action,[14] there is no basis as a matter of federal law for requiring such a showing to render collateral estoppel inapplicable to the *Alexander* case. Indeed, the Court of Appeals was required to consider petitioner's liability in *Alexander* on the basis of federal law and the evidence presented to the district court in 1963 without regard to the "law of the case" restrictions established on the prior appeal of the *Zdanok* case. Its failure to do this brings the *Alexander* decision in conflict with decisions of this Court and Courts of Appeals for the Third and Ninth Circuits.

Collateral estoppel, this Court has held, must "be confined to situations where the matter raised in the second suit *is identical in all respects* with that decided in the first proceeding." *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948). One factor always recognized by this Court to alter the identity of two proceedings is an intervening change of law which renders collateral estoppel inapplicable to the

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[14] But see, *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940), a case relied on by the Court of Appeals in support of its refusal to alter the prior *Zdanok* decision, where the court said: "But the Circuit Court of Appeals on second appeal certainly would not follow its earlier law of the case when there had intervened between the two appeals a controlling opinion of the Supreme Court." (116 F. 2d at 319).

second action. *Commissioner* v. *Sunnen, supra; Blair* v. *Comm'r*, 300 U. S. 5 (1937).

The intervening change of law need not be one demonstrating "clear error" in the first proceeding, as the court below required, but need only be "material" to the issues previously before the court and thereby raise the possibility of a different outcome upon reconsideration of the merits of the dispute. *Parker* v. *Westover*, 221 F. 2d 603 (9th Cir. 1955); *Commissioner* v. *Thomas Flexible Coupling Co.*, 198 F. 2d 350 (3d Cir. 1952); *Cf.*, *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940). There is no more appropriate case for application of this rule than *Alexander*, where petitioner was held estopped on the basis of a decision admittedly resting on state law despite this Court's intervening direction that federal substantive law should be controlling.

The *Alexander* decision is in direct conflict with this Court's decision in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948). There a prior ruling on payments made by the taxpayer to his spouse under a 1928 license agreement caused the Tax Court and the Eighth Circuit to bar a different result on grounds of estoppel for royalties paid pursuant to the same agreement in 1937. Despite the fact that there was a "complete identity of facts, issues and parties" in the two proceedings, this Court reversed the judgment of the Court of Appeals and remanded the case for reconsideration on the ground that intervening decisions of this Court concerning intra-family assignments of income *in other areas* represented "a sufficient change in the legal climate to render inapplicable * * * the doctrine of collateral estoppel." (333 U. S. at 606).

Also in conflict with the decision of the court below is *Parker* v. *Westover*, 221 F. 2d 603 (9th Cir. 1955), where

the District Court dismissed an action for refund of taxes by members of a family partnership on the basis of a prior decision, affirmed by the Ninth Circuit, which held the partnership invalid for tax purposes. Rejecting the Government's contention that an intervening change in law was not sufficient to render the estoppel doctrine inapplicable, the Ninth Circuit said (221 F. 2d at 606):

> "This is erroneous. In tax cases, a change in the controlling legal principles may make a prior determination obsolete. Collateral estoppel must be confined to situations where applicable legal rules remain unchanged; '* * * a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.' *Commissioner of Internal Revenue* v. *Sunnen*."[15]

See also, *Commissioner* v. *Thomas Flexible Coupling Co.*, 198 F. 2d 350 (3d Cir. 1952), where the Third Circuit expressly held, contrary to the decision of the court below, that "clear error" is not the test to be applied in determining whether an intervening change of law renders the doctrine of collateral estoppel inapplicable.

These cases demonstrate that the issue before the Second Circuit in *Alexander* was not whether the intervening change in controlling law announced by this Court's

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[15] The intervening change of law brought to the Ninth Circuit's attention in *Parker* was a statutory amendment which, although liberalizing the tests for validity of family partnerships, was not enacted until five years after the tax years in question and had no retroactive application. It was the legislative history of the new statute which the Ninth Circuit directed the district court to consider even though it merely recited what the Court of Appeals believed had "always been the law" and contained matters already considered by the court below (221 F. 2d at 603).

Smith decision created "a clear conviction of error" with respect to the prior *Zdanok* decision, but whether the decision effected "a sufficient change in the legal climate to render inapplicable, in the instant proceeding, the doctrine of collateral estoppel." *Commissioner* v. *Sunnen, supra,* at 606. The change in controlling law announced by this Court in *Smith* necessarily raised new issues in *Alexander* and called into play new factors for consideration by the Court of Appeals in this case.[16]

Perhaps the most convincing evidence of the "change in the legal climate" effected by *Smith* is the reaction of the Court of Appeals to the decision of the Sixth Circuit in *Oddie* v. *Ross Gear & Tool Co., Inc., supra,* a case decided on the basis of applicable federal law. Discussing the effect of this case, Judge Friendly remarked (page A-25 of appendix):

> "What the *Oddie* ruling does create, particularly when it is superimposed on Chief Lumbard's earlier dissent here and the great amount of critical discussion in the law reviews that our decision has engendered, is doubt whether, if other similar contracts should come before us for construction, we ought follow the lead of our divided decision in this case or of the unanimous contrary one of the Sixth Circuit in *Oddie.*"

The "doubt" these intervening decisions created may not have been sufficient for the Court of Appeals to alter

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[16] To make "clear error" rather than materiality the test, is to require review of the merits of a dispute as a prerequisite to determining whether the court is free to review the merits. This approach, resulting from the Court of Appeals' curious blend of "law of the case" and collateral estoppel principles, runs contrary to the very policy of judicial economy underlying the estoppel doctrine.

its prior *Zdanok* decision since it required "clear conviction of error" before deviating from the "law of the case" established on the prior appeal of that case. There can be no question, however, that such a doubt is all that is required to entitle petitioner to full consideration of its liability in *Alexander* as a matter of federal law.

Petitioner has been held estopped from contesting its liability in *Alexander* on the basis of a decision admittedly resting on state law[17] and, in the process, the directive of this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), where the lower federal courts were called upon to fashion a body of federal substantive law in this area, has been completely thwarted. By carrying over to *Alexander* the "law of the case" restrictions of *Zdanok*, the Court of Appeals rendered itself incapable of making the judgment that both *Lincoln Mills* and the more recent *Smith* decision required in this case. Here, as in *Commissioner* v. *Sunnen*, *supra*, the Court of Appeals "was unable to bring to bear • • • the full breath of the ideas" made relevant by the intervening change of law (333 U. S. at 607). Petitioner submits that the potpourri created by the court below in *Alexander* is not the creative and deliberative effort called for by this Court in *Lincoln Mills*, or what this petitioner is entitled to under this Court's more recent *Smith* decision.

It is no justification to say, as Judge Friendly did, that federal and New York law "are alike in that a court's job in interpreting a contract is to ascertain what the parties meant by the words they used" (page A-24 of appendix).

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[17] At the time the *Alexander* case came on for trial in the District Court, the only judgment which could have estopped petitioner was the first *Zdanok* decision, a case decided under New York contract law. It was not until the second appeal of the *Zdanok* case that the prior decision was reconsidered by the Court of Appeals and adopted as federal substantive law.

Indeed, to describe federal substantive law in this area with the simplicity suggested by the Court of Appeals is to reduce *Lincoln Mills* and its progeny to a tedious exercise in trivialities. The Second Circuit itself held long prior to *Lincoln Mills* that since §301 of the LMRA establishes a new cause of action for breach of collective bargaining agreements, it is "immaterial" whether or not the evidence presented would be sufficient for recovery on a similar cause of action brought under New York law. *Shirley-Herman Co., Inc. v. Int'l Hod Carriers*, 182 F. 2d 806 (2d Cir. 1950).

The Court of Appeals denied petitioner in *Alexander* not only the heretofore established right to defend against different parties in a different lawsuit (Part A, page 16 hereof), but also the more important right to a determination of its liability under federal law as required by this Court's intervening *Smith* decision. Accordingly, the *Alexander* case cannot be permitted to pass without consideration by this Court. Petitioner is entitled to a determination of its liability in *Alexander* as a matter of federal law by either this Court or the Court of Appeals on remand of the case to that court.

Conclusion.

For the foregoing reasons, the petitions for writs of certiorari should be granted in these cases.

Dated April 27, 1964

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